(37)

IN THE

Supreme Court of the United States

Term.

No. 1196. 143

MOE HENRY HANKIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari.

JOSEPH L. PRINCE,
MOE HENRY HANKIN,
IRA JEWELL WILLIAMS, JR.,
Counsel for Petitioner.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX.

	Page
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Summary Statement of the Matter Involved	2
Questions Involved	4
Reasons for Allowance of the Writ	5
Appendix. Opinion (C. C. A. 3rd) in the case of U. S. A. v. 576.734 Acres of Land	13

CASES CITED.

	Page
Boom Company v. Patterson, 98 U. S. 403	9
McCandless v. United States, 298 U. S. 342 (1936)	9
Olson v. U. S., 292 U. S. 246 (1934)	9
United States v. Chandler-Dunbar Co., 229 U. S. 53	8
United States v. Miller, 317 U. S. 369	5, 6, 8
United States ex rel. T. V. A. v. Powelson, 319 U. S. 266 (1943)	5, 9

STATUTES AND AUTHORITY CITED.

	Page
Act of August 1, 1888, (25 Stat. 357, 40 U. S. C. sec. 257) known as the General Condemnation Act	2
Appropriation Acts of December 17, 1941, 55 Stat. 815 and December 26, 1941, 55 Stat. 862	2
Declaration of Taking Act of February 26, 1931, (46 Stat. 1421, 40 U. S. C. sec. 258 (a)	2
Goodrich's "Conflict of Law," 2nd Edition, 1938, Chapter 5, Sec. 7	8
Judicial Code, Sect. 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Sect. 347)	2

IN THE

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No.

MOE HENRY HANKIN,
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v.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Moe Henry Hankin, appellee in the Court below, respectfully prays that a writ of Certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Third Circuit entered in the above entitled cause on the 22nd day of March, 1944. A petition for rehearing was filed on the 4th day of April, 1944, and a rehearing was denied by said Court on the 24th day of April, 1944, and the Judgment of said Court is final.

Opinions Below.

The Circuit Court of Appeals for the Third Circuit rendered an opinion in the case, which was filed on March 22, 1944. A copy of said opinion is fully set forth in the appendix hereto. An opinion by the District Court which was filed August 5, 1943 is reported at 50 F. Supp. 996 (218a).[1]

[1] Page references "a" are to the appendix of the record used in the Circuit Court of Appeals.

Jurisdiction.

The jurisdiction of this Court to issue the writ of Certiorari herein prayed for, is invoked under Judicial Code, Sect. 240 (a) as amended by the Act of February 13, 1925, 43 Stat. 938 (U. S. C. Title 28, Sect. 347).

Statutes Involved.

The statutes involved are (1) Act of August 1, 1888, (25 Stat. 357, 40 U. S. C. sec. 257) known as the General Condemnation Act; (2) the Declaration of Taking Act of February 26, 1931, (46 Stat. 1421, 40 U. S. C. sec. 258 (a); (3) and the Appropriation Acts of December 17, 1941, 55 Stat. 815 and December 26, 1941, 55 Stat. 862.

Summary Statement of the Matter Involved.

This is an application for a writ of Certiorari to the Circuit Court of Appeals for the Third Circuit to review a judgment dated March 22, 1944, reversing a judgment of the United States District Court for the Eastern District of Pennsylvania dated October 14, 1943 (223a).

The United States on March 22, 1942, filed a Declaration of Taking for a quantity of land in Montgomery County, Pennsylvania, and judgment thereon was filed the same day (26a). As a result of the condemnation the petitioner, Moe Henry Hankin, lessee, (33a) of a tract of land so taken has suffered the destruction of a grain and straw crop (44a).

A Board of Review on January 27, 1943 reported a finding of damages in the amount of $3400 (39a) and the petitioner appealed.

At a jury trial before the United States District Court on April 26, 1943, evidence was introduced to show that in the fall of 1941, the petitioner sowed 95.9 acres of grain—namely 40 acres of wheat and 55.9 acres of grain mixture, comprising 75% wheat and 25% rye. (56a, 164a.) The soil was of good fertility and had been carefully prepared,

(68a, 117a, 120a, 138a), that a high quality of seed and fertilizer were used. (138a.) That the wheat was in good condition at the time of the taking on March 23, 1942. (18a, 72a, 92a, 122a, 141a, 165a.) There was also testimony as to the estimated yield of wheat, mixed grain and straw (74a-76a, 101a, 126a, 145a, 167a) and as to the cost of harvesting and marketing the crops. (96a-98a, 127a-130a, 146a-148a, 167a-170a.)

The evidence showed that the average market price of wheat was $1.20 a bushel at harvest time, in August of 1942 (156a), and $1.51 in January of 1943 at Philadelphia, Pa. (156a). That the price of the mixed grain would be about 2 cents per bushel less than the wheat. (158a.) There was testimony as to the market value of straw in August 1942 (153a) and in January 1943 (149a).

There was evidence as to the favorable weather conditions in the summer of 1942 and that there was no disease or pestilence (126a). There was evidence to show that there was no market price for growing immature grain crops in this locality during March 1942 nor at any time. (184a-186a; 150a.)

The most important evidence produced upon which this case turns is that it was the sound business practice and custom of both the petitioner and the farmers in this locality to keep part of the grain for seed and to sell the balance of their grain and straw crops during the month of January of every year—the market season. (110a, 131a, 170a.) There was evidence that this grain could not be bought in this locality except during the customary market season, namely January of each year. (104a, 220a.)

The respondent objected to the admission of the January prices as going beyond the harvest period (109a). However, the Court overruled the objection (110a, 131a) on the theory that since it was an established custom for the farmers in that locality to sell their wheat in January, the petitioner would not be fairly compensated unless consideration were given to the market value at the time he

would have sold his crops, as well as to the market value at the time of the harvest—as both reflected the market value of the growing crop at the time of the taking March 22, 1942. (104a, 222a.)

The respondent renewed its objection to the consideration of the January prices in its requested points for charge (215a) and again in its motion for a new trial (217a) after the jury had returned a verdict for $6,169.37 (211a). On August 5, 1943, the Court denied the motion for a new trial (222a) and filed a written opinion (218a-222a) reported at 50 F. Supp. 996. Judgment was entered on the jury verdict on October 14, 1943 (223a) and respondent appealed to the Circuit Court.

On March 22, 1944, the United States Circuit Court of Appeals for the Third Circuit filed an opinion which reversed the judgment of the United States District Court and remanded the case for further proceedings. The main reason for the Circuit Court's reversal was that "the admission of evidence concerning January prices of grain was erroneous and that it necessarily got the jury's attention away from the elements of compensation proper for their consideration."

On April 4, 1944, the petitioner filed a petition with the Circuit Court for a rehearing and a rehearing was denied by said Court on April 24, 1944.

Questions Involved.

1. Where there is no market value of a growing and immature crop at the time of a taking under a federal condemnation, is it proper to take into consideration both the average market price at harvest season and the average market price at the customary market season as reflecting the market value at the time of the taking, or are we limited to the average market prices at harvest period?

2. May the United States Circuit Court of Appeals in the case of condemnation under federal law, as to matters of compensation, make any analogy to tortious cases aris-

ing among the states, when the law as laid down in *United States v. Miller*, 317 U. S. 369, (1943) provide that matters of compensation are substantive and not procedural and hence the federal law is applicable?

3. Was the District Court correct in refusing to admit evidence as to the cost of planting the grass seed where there is no evidence as to whether such obligation exists?

4. In realty, the law is well settled that in ascertaining the market value at the time of taking under a federal condemnation consideration is given to the uses and purposes for which the property is adopted in the near future; is the law any different when it comes to growing immature crops?

Reasons for Allowance of the Writ.

I.

The decision of the Circuit Court of Appeals for the Third Circuit in this case is inconsistent and in conflict with the law as laid down by the Supreme Court of the United States.

A. The fifth amendment of the Federal Constitution provides, "that private property shall not be taken for public use without just compensation." "Just compensation" has been consistently held to be, by the long line of United States Supreme Court cases including the two most recent—"the market value of the property at the time of the taking." *United States v. Miller*, 317 U. S. 369 (1943); *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943).

The date upon which this leasehold or grain crop was taken was March 22, 1942 (26a) (Leasehold's main item was grain crop as entire farm was planted in grain).

However since there was no market value of the crop as such, on March 22, 1942, (184a-186a; 150a) the Circuit Court has clearly erred in stating that the market value of the harvested crop in August 1942, the time of the har-

vest should be taken into consideration, while the market value of the same crop during the customary sale season namely January, 1943 should not.

The reason for the Circuit Court's holding is as follows: "Since as a practical matter that value (referring to market value of the leasehold at the time of taking) cannot be actually determined, the nearest time thereafter when a value can be placed upon the crops is considered."

The Circuit Court is departing from the strict rule, as laid down by the Supreme Court decisions, that it is the time of the taking that governs; instead they lay down a rule that where there is no market value at the time of the taking it is some other time that governs, namely the closest time from the date of taking when a market value can be ascertained.

Surely it is not the element of how soon after the taking a price can be put on the harvested crop that reflects the value of the crop at the time of the taking but rather all the elements of value which attach to this particular crop and which directly affected the value at the time of the taking. *United States v. Miller*, 317 U. S. 369.

Although the Circuit Court's standard is convenient and easy to apply, it is in complete disregard of a proper evaluation of all the elements which should be considered in determining the value of the leasehold of the time of taking.

Clearly willing, prospective buyers and sellers of this crop on March 22, 1942 would take into consideration both, first, the expected market value of the crop as of harvest period—August, 1942, and second, the expected market value of the same crop in January, 1943—the customary sale period of this crop.

Clearly, both of these prices reflected the market price of the growing crop on March 22, 1942. Surely if any of these two prices reflect the price of the growing crop at the time of the taking, it is the second, namely, January 1, 1943, more so than the first, as the important factor in this

case which appears to have been overlooked by the Circuit Court is the fact that it is the practice in this community to keep part of the grain for seed and to sell the balance of the crop in January.

A buyer of this leasehold on March 22, 1942, would take this important element into consideration as it also reflects and helps to determine the market value of the growing crop on March 22, 1942.

Even if we take the reasoning of the Circuit Court that "the nearest time thereafter when a market value can be placed upon the crops is considered" the Circuit Court has made a grievous error in applying the reasoning to the set of facts.

The facts are uncontradicted as the record disclosed that this grain was of a particular kind and quality namely Leep's Prolific wheat with a slight mixture of Pa. 34 (137a), and could not be bought on the open market in this locality, except during January of each year. To apply the Circuit Court's reasoning, it would be January, 1943, and not July, 1942, as the market time when a market price could first be put on the crop—as January, 1943, would be the first time that this particular type of wheat would be sold on open market in this locality.

However, the petitioner contends that the United States District Court was correct in the charge to the jury that both the market prices of a crop similar as possible to this crop in quality in August, 1942, and the market prices of this crop in January, 1943, the customary sale period for this crop in the community were two elements which helped to reflect and have a direct bearing on the value of the growing crop as of March 22, 1942.

To hold, as the Circuit Court held, to permit evidence of the August price and not the January price when as a matter of fact both help to reflect the market value of the leasehold in March, 1942, was error and arbitrary.

Furthermore the Circuit Court overlooked the important fact that although the lease expired at the end of the harvest period, the leasehold had certain attached interests which did not expire at harvest time with the lease. Such attached interests were the right of the petitioner to take his grain with him and use a substantial part of it for seed in the fall and sell the balance during the customary sale season in January, 1943 (110a, 131a, 170a).

II.

Since this is a taking under Federal Law the Rules of Conflicts of Law as laid down in *United States v. Miller*, 317 U. S. 369, and in Goodrich's "Conflict of Law," 2nd Edition, 1938, Chapter 5, Sec. 7, provide that matters of compensation are substantive and not procedural, hence the federal law is applicable, and the analogy made by the Circuit Court to tortious cases arising among the States is prejudicial to petitioner's case.

III.

The District Court was correct in refusing to admit evidence as to the cost of planting the grass seed since no evidence was introduced to establish such an obligation. The written lease speaks for itself (33a) and any legal interpretations which either petitioner or respondent inject which are not correct have no binding effect (170a).

IV.

The United States Supreme Court has expounded the proposition in many cases that in matters of federal condemnation of realty, in ascertaining the market value at the time of the taking, consideration must be given for all available uses and purposes to which the property may be used in the near future. In *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, the Court said "The owner must be compensated for what is taken from him but that is

done when he is paid its market value for all available uses and purposes." The Supreme Court of United States has also said "As a general rule, compensation to the owner is to be estimated by reference to the uses for which the appropriated lands are suitable, having regard to the existing business or wants of the community or such as may be reasonably expected in the immediate future." *Boom Company v. Patterson*, 98 U. S. 403. *McCandless v. United States*, 298 U. S. 342 (1936). *Olson v. U. S.*, 292 U. S. 246 (1934).

In the *McCandless* case, the owner of a plantation upon which most of the land was used for grazing was permitted to show that he had a plan whereby he was going to irrigate the plantation and raise sugar cane. The court held that this evidence was admissible to reflect the market value at the time of the taking. The court held, "In condemnation cases the most profitable use to which the land can probably be put in the reasonably near future may be shown and considered as bearing upon the market value." The court even went further and said "And the fact that such use can be made only in connection with other lands does not necessarily exclude it from consideration if the possibility of such connection is reasonably sufficient to affect market value." *McCandless v. United States, supra.* The same idea was expounded in *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266 (1943). The court there held "That value may reflect not only the use to which the property is presently devoted but also, that use to which it may be readily converted." The court further said "In that connection the value may be determined in light of the special or higher use of the land when combined with other parcels; it need not be measured merely by the use to which the land is or can be put as a separate tract."

The Supreme Court of the United States has definitely held in all these cases that the various uses and purposes for which land may be used in the near future is admissible in reflecting the market value at the time of the taking.

Is the rule any different when we come to growing immature crops where there is no market value at the time of the taking? The Circuit Court's decision would seem to be in the affirmative, as they said it was error to introduce evidence as to value beyond the harvest period, even though the uses and purposes for which this crop was raised extended beyond the harvest season (105a, 170a).

This crop was raised for uses and purposes which extended beyond the harvest period, namely for seed to be used in the fall and also for the sale during the market season in this locality—January, 1943. Buyers and sellers would take these uses and purposes in consideration in buying the growing crop at the time of the taking—namely March 22, 1942. Since these uses and purposes are elements of value as it is in realty, the petitioner strongly contends that it was proper to consider them as reflecting the value at the time of the taking.

Although there are many cases on point as regard federal condemnation of realty as was outlined above, yet it is your petitioner's belief that this is a case of first impression before the Supreme Court of the United States on the question of growing and immature crops which have no market value at the time of the taking.

Since there are many federal condemnations today as a result of which growing crops are destroyed, this matter is of great importance because of the issues involved. The issues herein affect the farmers vitally and since public welfare depends so much upon the farmer both in Peace and War, your petitioner prays for a Writ of Certiorari for the sake of national interests.

Your petitioner presents to this Court and files herewith a duly certified transcript of the entire record of the case as the same appears in the Circuit Court of Appeals for the Third Circuit.

Wherefore your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court to the Circuit Court of Appeals for the Third

Circuit, to the end that the judgment of said Circuit Court of Appeals for the said Circuit may be reviewed by this Honorable Court.

MOE HENRY HANKIN,
Petitioner.

JOSEPH F. PRINCE,
MOE HENRY HANKIN,
IRA JEWELL WILLIAMS, JR.,
Counsel for Petitioner.